NO. 22653

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH LEROY HOWARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

STATEMENT OF JURISDICTION AND PROCEEDINGS

This is an appeal by defendant Howard, pursuant to 18 U. S. C. §§ 1291, 1294, from a conviction for violations of 21 U. S. C. §174 and §176a.[1/]

On July 5, 1967, the United States Grand Jury for the Central District of California, returned an indictment charging the defendant:

In Count One, with intent to defraud, knowingly receiving, concealing and facilitating the transportation and concealment of approximately 11,000 grams of illegally imported marihuana, in violation of 21 U. S. C. §176a; and, in Count Two, with knowingly and unlawfully receiving, concealing and facilitating the concealment

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1/ Whether designated as 21 U. S. C. §176a or as 21 U. S. C. §176(a), the same statute is meant to be referred to: 21 U. S. C. §176a.

and transportation of 51 grams of illegally imported heroin hydrochloride, in violation of 21 U.S.C. §174 (C.T. pp. 2, 3).[2/]

On September 12, 1967, before the Honorable Charles H. Carr, United States District Judge, a hearing was held on the defendant's motions to dismiss the indictment and to suppress certain evidence (C.T. 38). After receiving evidence, and hearing argument, the court denied the motions (C.T. 38).

The United States and the defendant waived their right to trial by jury and to special findings of fact, and on September 12, 1967, the case proceeded to a court trial (C.T. 38, 39). The parties stipulated that the testimony taken by the court during the motion to suppress could be considered by the court as if offered by the Government during its case-in-chief (R.T. 104-107).[3/]

On September 13, 1967, the court found the defendant guilty on both counts (C.T. 40). On October 9, 1967, the court sentenced the defendant to five years on each count, the sentences to begin and run concurrently (C.T. 49, 50, 55). Motions by the defendant for judgment of acquittal or for a new trial, were denied (C.T. 50).

On October 9, 1967 the defendant filed a notice of appeal (C.T. 51).

1/ "C.T." refers to Clerk's Transcript.

2/ "R.T. refers to Reporter's Transcript.

STATEMENT OF ISSUES

1(a). Do 21 U.S.C. §174 and 21 U.S.C. §176(a) by distinguishing between a court trial and a jury trial, condition defendant's right to a jury trial in violation of U.S. Constitution Amendments V and VI?

1(b). Does the quantum of evidence necessary to sustain a conviction under 21 U.S.C. §§ 174 and 176(a) depend upon whether that conviction is by a court or jury?

2. Do 21 U.S.C. §174 and 21 U.S.C. §176(a) require the defendant to testify against himself or otherwise invade the defendant's right against self-incrimination in violation of the U.S. Constitution Amendment V?

3. Does the statutory evidence rule, in 21 U S.C. §174 and in 21 U.S.C. §176(a), irrationally associate possession of narcotics and marihuana, respectively, with the fact of the importation contrary to law, or with knowledge by the defendant of such illegal importation?

4. Did the seizure and search of the defendant's Buick violate U.S. Constitution Amendment IV?

5. Is the evidence sufficient to sustain the conviction for violating 21 U S.C. §176(a)?

6. Is the evidence sufficient to sustain the conviction for violating 21 U.S.C. §174?

7. Should this Court in affirming the conviction reach all of the constitutional questions raised?

STATEMENT OF FACTS

The uncontradicted evidence at trial was produced from seven government witnesses (R. T. 11, 44, 56, 66, 108, 115, 137). Defendant Kenneth LeRoy Howard (hereinafter referred to as "Howard") did not testify and defendant produced no other witnesses (R. T. 143).

About May 16 or 17, 1967, one Tuaco hired Jesus Rios to drive a load of marihuana from Tijuana, Mexico to Los Angeles, California using Rios' Chevrolet automobile (R. T. 53-55). Tuaco worked for Patricio Basera, a known major narcotics transporter and dealer (R. T. 54). Soon after, Rios reported his conversations about the marihuana to U. S. Customs officials (R. T. 56, 57). Rios became a special customs employee and was later paid $500 for his services (R. T. 15, 17, 66).

On May 21, 1967, Rios left his car with Patricio in Tijuana (R. T. 63, 64). He called U. S. Customs and told them his car was in Tijuana being loaded with marihuana (R. T. 56-58). Rios described this car to Customs Agent White, who told Rios to re-enter the United States with the car through border lane one (R. T. 58, 59). White arranged an entry without inspection, assuming that, if Rios came through with the car, then the car contained marihuana (R. T. 59, 60). Several hours later, Rios returned to Tijuana and picked up his car. Patricio said the marihuana was in the car, although Rios didn't see it. Patricio told Rios to drive the car to a motel in Hollywood and to report his arrival to Tijuana,

after which he would receive further instructions (R. T. 17, 18, 63-66, 20).

Later, that day, Rios drove his car through lane one into the United States, under the surveillance of Customs Agenst White and Greppin (R. T. 17-19, 45, 60). To protect the security of the investigation, the car was not seized at the border and Rios was told to proceed to Chula Vista, California (R. T. 45, 60). Rios was escorted from the border by White and Greppin (R. T. 16, 36, 37). At a bowling alley, in Chula Vista, California, fifteen miles north of the border, White and Greppin inspected the Chevrolet and saw marihuana bricks in the panels (R. T. 47, 49, 50). At this time they seized the marihuaha although they left it in the Chevrolet (R. T. 61, 62, 50).

Rios, driving the Chevrolet, and Greppin and White, arrived at the Los Angeles federal building about 10:30 p. m. on May 21, 1967 where they met Customs Agent McCombs (R. T. 15, 16). The Chevrolet was examined and one hundred sixty pounds of marihuana was discovered hidden beneath the seats and in the panels. Seventy eight bricks were removed, and some marihuana was left in the car (R. T. 14, 15, 21, 22).

Rios, in accordance with instructions he had received, was taken with the car to a motel in Hollywood where he and the car remained throughout part of May 22, 1967 (R. T. 13-19). Rios made a few calls to Tijuana in which he spoke with three persons and received instructions to park the Chevrolet at a location on 32nd Street in Los Angeles (R. T. 20, 32-35).

On May 22, 1967, before 10:00 p. m., Rios drove the car to the location on 32nd Street between Hill and Broadway in Los Angeles, followed by U. S. Customs Agents (R T. 29, 116). The car was parked and a surveillance was established (R. T. 29, 121).

On May 22, 1967, after the load car was parked, Howard, driving a 1963 bronze Buick in an easterly direction on 32nd Street, passed the load vehicle and arrived at the intersection of 32nd Street and Broadway. Agent Diaz, walking in a westerly direction on the south side of 32nd Street, arrived at the intersection at the same moment. Diaz entered the crosswalk, as Howard turned right onto Broadway blocking the crosswalk. Howard stopped his forward motion and backed up in the direction Diaz was walking. While he backed up Howard watched Diaz in a way which drew Diaz' attention to him. Diaz continued walking west along 32nd Street and Howard disappeared from view. Two or three minutes later Diaz again saw Howard. At this time Diaz had reached the load car, the Chevrolet, which was parked about 150 feet east of Hill Street on the south side of 32nd Street. Howard was now driving in the same direction Diaz was walking, west along 32nd Street. Howard passed the load car, crossed Hill Street and parked the Buick on the north side of 32nd Street, about 100 feet from the intersection of 32nd Street and Hill. Diaz saw Howard leave the Buick and walk back toward Diaz and the load car. At one point they were within fifty feet of each other. Diaz reached the corner, turned south onto Hill Street, lost sight of Howard, and ran around the block toward the intersection of 33rd Street and Broadway. He

saw the load car, driven by a male, turn right from 32nd Street onto Broadway, and travel south along Broadway. Diaz entered his own car, and, over his radio, reported that the load car had been driven away (R. T. 115-126).

Howard was under nearly continuous surveillance by Customs Agents in five or six cars. Howard first drove to a Chevron Service Station on 40th and South Broadway where he stopped and spoke to an attendant. He then walked toward two telephone booths. Three to five minutes later, Howard was again driving the Chevrolet south along Broadway. Howard turned right onto 46th Street and halfway up the block, pulled to the curb, turned his lights off, and parked (R. T. 13, 29, 107-109, 112-114). It was about 10:15 p. m. (R. T. 14).

Customs Agents went to Howard, identified themselves, and placed him under arrest for violating federal marihuana laws. Howard was removed from the Chevrolet and advised of his constitutional rights (R. T. 26-28, 32, 107-109, 128-129). Howard said he had taken the Chevrolet because he intended to steal the mag wheel rims and had parked on 46th Street because he intended to remove the rims. He intended to sell them for $8 each. (Mag rims are expensive special wheels used by custom car and sports car fans). (R. T. 27, 109, 128-129).

Howard was searched after he was arrested. Eight hundred seventy nine dollars in cash and some car keys were discovered (R. T. 110-112). Howard said that he was an unemployed barber and that the money was his life savings (R. T. 128-129).

The Chevrolet was examined on 46th Street, and the agents verified the presence of marihuana bricks in the right door panel. The marihuana was later removed from the Chevrolet (R. T. 103, 104, 128-129, 134-136).

The Buick was then immediately seized by several Customs Agents, acting under orders from Agent McCombs. The basis for the seizure was the use of the Buick to facilitate the concealment, receipt and transportation of illegally imported marihuana (R. T. 24, 25, 31, 33-34, 127, 136-139). The keys found on Howard were used to unlock the Buick and to operate the Buick, which was driven to the Los Angeles federal building parking lot (R. T. 24-26, 127, 136-139). The Buick was searched at the parking lot. Fifty-one grams of heroin, packaged in a rubber prophylactic, and 18.7 grams of cocaine, were discovered in the console glove box between the front seats (R. T. 33, 34, 41, 103, 104, 137, 138).

ARGUMENT

I

THE COURT SHOULD AFFIRM THE JUDGMENT BELOW, UPON THE OBVIOUS CORRECTNESS OF THE CONVICTION UNDER 21 U. S. C. §176(a), AND AVOID THE UNNECESSARY DECISION OF NUMEROUS CONSTITUTIONAL ISSUES.

Most of Howard, s claims of error relate to the existence and use of the statutory rule based upon possession, and the seizure and search of the Buick, which disclosed the heroin. The

decision of these constitutional issues is unnecessary since Howard received concurrent five year sentences. Page v. United States, 356 F. 2d 337 (9th Cir. 1966); United States v. Gainey, 380 U. S. 63, 65 (1965).

The evidence in the case is clearly sufficient, apart from any statutory rule of evidence, to sustain the conviction under 21 U. S. C. §176(a). The sufficiency of the evidence is discussed below in the last section of this brief. If this Court follows this approach, then the only other issue which would have to be dealt with is Howard's claim that the decisions in Marchetti v. United States, 390 U. S. 39 (1968); Grosso v. United States, 390 U. S. 62 (1968) and Haynes v. United States, 390 U. S. 85 (1968), require a reversal here.

II

NEITHER 21 U. S. C. §174 NOR 21 U. S. C. §176(a) DISTINGUISHES BETWEEN A COURT AND JURY TRIALS.

Howard's arguments that 21 U. S. C. §174 and 21 U. S. C. §176(a) distinguish between court trial and jury trials in two ways ignores the settled interpretation of both statutes. The statutory rule of evidence based upon unexplained possession operates in both court and jury trials. Howard is wrong when he argues that the rule applies only in jury trials, and that the difference means that different quantities of evidence are needed to sustain a conviction depending on the mode of trial.

No case is cited in support of the novel interpretation of 21 U. S. C. §174 and §176(a) which Howard now urges upon this Court. (Appellant's opening brief, p. 6, line 13-p. 7, line 4).

In United States v. Gainey, 380 U. S. 63 (1965), speaking of an analogous rule, the court said that a jury is not required to use the rule. It said:

> "The jury was thus specifically told that the statutory inference was not conclusive. 'Presence' was one circumstance to be considered among many. Even if it found that the defendant had been present at the still, and that his presence remained unexplained, the jury could nonetheless acquit him if it found that the Government had not proved his guilt beyond a reasonable doubt." (at p. 70).

In Pool v. United States, 344 F. 2d 943 (9th Cir. 1965), the court, sitting without a jury, convicted the defendant of a violation of 21 U. S. C. §174, using the statutory rule of evidence. The leading Ninth Circuit case on the meaning of "possession" arose on an appeal from a court trial convicting the defendant under 21 U. S. C. §174. Hernandez v. United States, 300 F. 2d 114 (9th Cir. 1962). If Howard is right, then the entire Hernandez opinion is dicta. In Williams v. United States, 290 F. 2d 451 (9th Cir. 1961), the court reversed a non-jury lower court conviction because the evidence was insufficient to sustain a finding that the defendant had possession of the marihuana. In Notaro v. United States, 388 F. 2d

680 (9th Cir. 1967), 363 F. 2d 169 (9th Cir. 1966), this Court sustained the conviction of the defendant for violating 21 U. S. C. §176(a), which was made by the lower court sitting without a jury, upon evidence showing no more than possession of the marihuana by the defendant.

In Verdugo v. United States, No. 20803, (9th Cir. 1968), this Court said:

> "The second paragraph of §174 permits the trier of fact to infer guilt from unexplained possession of the narcotic drug by the defendant . . .
>
> "It remains the right of the trial judge to direct the verdict or enter a judgment n. o. v. when the evidence as a whole is insufficient to support a conviction as a matter of law, notwithstanding proof of possession. And although the evidence as a whole meets this minimum standard, it remains the function of the jury to determine whether that evidence, including the evidence of possession, establishes each element of the offense beyond a reasonable doubt. United States v. Gainey, 380 U. S. 63, 68, 70 (1965)." (Slip opinion at p. 4) (Emphasis added).

Howard's reliance upon United States v. Jackson 390 U. S. 570 (1968), is misplaced. That case did not deal with these statutes and is distinguishable. The Jackson case holds that the Federal Kidnapping Act, 18 U. S. C. §1201(a), did differentiate

§176(a) is not error. As to the marihuana, there is no evidence that the trial court relied upon the statutory inference, and there was clearly independent evidence regarding the unlawful importation and Howard's knowledge. In reviewing a judgment, the appellate court adopts all inferences favorable to the judgment below. (See Section VII of this brief, below). Second, the record shows no one compelled him to testify, and any argument against the statutes on that ground is gratuitous. Third, the record shows he was not prevented from testifying, but that he exercised his Fifth Amendment right to not take the stand.

The old argument that the statutory rule of evidence provisions in 21 U. S. C. §174 and §176(a) require the defendant to testify personally has been repeatedly rejected for forty-three years. In Yee Hem v. United States, 268 U. S. 178, 185 (1925), the court said: "The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article prima facie evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a prima facie case of concealment with knowledge of unlawful importation were made by

Considering both the long history rejecting Howard's claim of a Fifth Amendment violation, and the absence of any reason, policy or authority for changing the statutory meaning to create that constitutional problem, Howard's position should be rejected.

IV

THE STATUTORY RULE OF EVIDENCE PERMITTING CONVICTION UPON EVIDENCE OF UNEXPLAINED POSSESSION OF HEROIN OR MARIJUANA IS NOT UNCONSTITUTIONAL.

Howard's attempt to reverse his conviction because the trial court might have applied the statutory rule of evidence is without merit. (See appellant's brief, p. 6, lines 1-5, p. 11, lines 9-15.) It is clear that the provision in 21 U.S.C. §174 and §176a which permits conviction upon a showing of unexplained possession of the narcotic drug or marihuana, respectively, functions as a " . . . statutory rule of evidence . . . " Erwing v. United States of America, 323 F. 2d 674, 679 (9th Cir. 1963). Cf. United States v. Gainey, supra. As this court said:

> "Thus the function of 'possession' in the statutory scheme is to shift to the defendant the burden of identifying the legitimate source of the narcotic drugs, if, indeed they were not illegally imported. This statutory rule of evidence rests upon (1) the rational relationship between 'possession' of narcotic drugs by the defendant and knowledge on his part that a substance which is normally imported and rarely imported legally, was in fact imported contrary to law, plus (2) as a corollary, the consideration that the 'possessor' of the narcotic drugs has so much more convenient access to

the facts as to their source that it is not unreasonable to require him to come forward with an explanation. Hernandez v. United States of America, 300 F.2d 114, 118, 119 (9th Cir. 1962).

The Supreme Court and this court have repeatedly upheld the rationality of this rule when dealing with heroin. Yee Hem v. United States of America, 268 U.S. 178 (1925). In Juvera v. United States of America, 378 F.2d 433, 437 (9th Cir. 1967) this court described the charge of unconstitutionality as " . . . an utterly groundless assertion." When the challenge arose in a prosecution under 21 U.S.C. §176a, this court rejected it. Zaragoza v. United States of America, 389 F.2d 468 (9th Cir. 1968).

In United States v. Gainey, 380 U.S. 63 (1965) an analogous statutory inference was sustained by the Supreme Court. It said:

" . . . the constitutionality of the legislation depends upon the rationality of the connection 'between the facts proved and the ultimate fact presumed' (citation). The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." (at pp. 66, 67).

This court recognized the rationality, when heroin is the

defendant knew it. The point is discussed in the last section of this brief.

Erwing v. United States, 323 F. 2d 674 (9th Cir. 1963) relied upon by Howard, is distinguishable. The defendant there introduced evidence to show that the operation of the statutory rule in that case would not be rational because there was no way to tell whether the cocaine involved was imported. Cocaine was legally manufactured and distributed in the United States, and there was no evidence to show the defendant in possession of any substance which was not legal in the United States. In this case, Howard introduced no evidence of any kind with respect to the rationality of the statutory rule.

Further, in our case, there was evidence that the statutory rule was operating rationally. The marihuana was known to be from Mexico, and, as to heroin, the rule always seems to be rational, considering the present laws. See 21 U.S.C. §§173, 188b, 188c, 188d.

The adoption of Howard's position regarding the statutory rule would vastly increase the already great difficulty of controlling the illegal, clandestine traffic in marihuana and heroin. The only beneficiaries would be the importers, distributors and wholesalers engaged in this illicit industry. The constitution does not require, and sound policy forbids this result, unless a compelling, overriding interest can be shown. Congress and the President, in enacting these statutes, have said none exists, and Howard has not given this court any reason to contradict that judgment. (In Leary

v. United States, 392 U.S. 903 (1968), certiorari has been granted on this issue.)

V

THE MARCHETTI, HAYNES AND GROSSO DECISIONS DO NOT PROVIDE A BASIS FOR NULLIFYING 21 U.S.C. §174 AND 176a.

Howard's mysterious, unexplained contention that the decisions in Marchetti v. United States, 390 U.S. 39 (1968), Grosso v. United States, 390 U.S. 62 (1968) and Haynes v. United States, 390 U.S. 85 (1968) are authority for the proposition that 21 U.S.C. §§174, 176a "directly or indirectly [violate] the privilege against self-incrimination", is incorrect. [Appellant's brief, p. 6, lines 6-12]. Neither the reported decisions nor an analysis of the statute sustains Howard's contention.

In Leary v. United States, 383 F.2d 851 (5th Cir. 1967); reh. en banc den., 392 F.2d 220 (5th Cir. 1968), the remoteness of the point was so great that the point was ignored by the defendant and the court. The defendant was attempting to go from Laredo, Texas to Mexico, when an inspection of his car and person disclosed marihuana. He was convicted of violations of 21 U.S.C. §176a and 26 U.S.C. 4744(a)(2). After his first appeal, the Marchetti, Grosso and Haynes decisions were reported. In his petition for rehearing, he raised the decisions, asserting that they compelled a rehearing and reversal of his conviction under 26 U.S.C. 4744(a)(2). The obvious inapplicability of the decisions

to his conviction under 21 U.S.C. §176a is demonstrated by the failure of the appellant to raise, or of the court to note, a claim that these decisions might operate to invalidate his conviction under 21 U.S.C. §176a.

Howard's contention was considered and rejected by two district courts. United States v. Reyes, 280 F. Supp. 267 (S.D.N.Y. 1968) is much like this case. The Court said, in part:

> "In short, in Marchetti, Grosso and Haynes, defendants were each charged with a crime, an essential element of which was the failure to do an act, the doing of which would have required the defendant to incriminate himself; such is not this case."
> (at p. 270).
>
> And it quoted this language from another case:
> ". . . the United States has a right to prohibit entirely the importation of marihuana and has a right to attach conditions as to its importation. Pickett had the choice to obey the regulations or refrain from bringing the marihuana into the United States; (2) If Pickett had been required to invoice the marihuana, such action would not have subjected him to prosecution under 26 U.S.C. §4744 since that statute has reference to marihuana possessed or obtained, etc. within the United States. When Pickett came from Mexico, and until he passed the Port of Entry, or disregarded

his first opportunity to invoice the marihuana, he had not entered the United States." (at p. 272).

It concluded: " . . . despite the fact that the rationale of the Fifth Circuit decisions and of Pickett, supra, has been eroded, it seems clear that the Supreme Court's decisions in Marchetti, Grosso and Haynes do not invalidate an indictment for possession of unregistered and untaxed marihuana against one who was not required to incriminate himself." (at p. 272).

In United States v. Vial, 282 F. Supp. 472 (D. Mass. 1968), Chief Judge Wyzanski rejected this claim in a brief opinion. Cf. Arrizon v. United States, 224 F. Supp. 26 (S. D. Calif. 1963).

No court dealing with this question has sustained Howard's contention of unconstitutionality.

An analysis of the operation in this case of 21 U. S. C. §174 and 21 U. S. C. §176a shows the claim to be untenable. Howard has not been convicted of failing to register his possession of either the marihuana or the heroin. He has been convicted, in both counts, of "receiving, concealing and facilitating the transportation and concealment." Howard could not have complied with either statute by registering his intent to possess before, or his possession after, he acquired the contraband. The only point at which a declaration could have affected the character of the contraband was at the time and place of entry into the United States.

The tax statutes, which do contain registration requirements, are not part of this statutory scheme. This court has already recognized that there is no relationship between 21 U. S. C. §174

and some of the narcotics taxing statutes. In Verdugo v. United States of America, No. 20,803 (9th Cir. May 16, 1968) (slip opinion, pages 8 and 9), the court said: "None of the cases cited in Mathes Devitt's work in support of the instruction suggests this interrelationship between 21 U.S.C. §174 (1964) and the narcotic-taxing statutes 26 U.S.C. §§4701-4707 (1964). We have found none that do. 26 U.S.C. §4704(a) (1964) can be traced no farther back than the act of February 24, 1919 40 Stat. 1131, or perhaps, considered more generally, the Act of December 17, 1914, 38 Stat. 785. The origins of 21 U.S.C. §174 are found in the Act of February 9, 1909, 35 Stat. 614. When Congress made it an offense to "conceal" narcotic drugs in 1909 it could hardly have had in mind their failure to satisfy a tax obligation which did not exist until 1919, or 1914, at the earliest." An analysis of the comparative legislative history of 21 U.S.C. §176a and 26 U.S.C. §4741 et seq. shows a similar diverse origin.

There are both other federal statutes relating to marihuana, 26 U.S.C. §4741 et seq., and heroin 26 U.S.C. §4701 et seq. and other state statutes relating to them. See California Health and Safety Code, §§11530, 11501. Howard could have been convicted of some of them on this evidence. But, while he might have avoided some of those prosecutions by registration, he could not have avoided these, once he acquired the contraband. Convictions under other statutes are not before this court in this case.

Further, 21 U.S.C. §174 and 176a are not directed towards a highly selective group inherently suspect of criminal activities.

This court should not accept Howard's implied argument that "the narcotic drug business consists entirely, or even in the main, of shadowy figures in the underworld passing small glassine bags in dark alleyways . . . ."

> "As of December 1966 there were 394,193 persons duly registered under the narcotics laws who were authorized to obtain written order forms from the government and engage legitimately in narcotic drugs transactions, and of these only one person was prosecuted during 1966 for a violation . . . [In 1966] over 170,000 kilograms of opium and over 260,000 kilograms of coco leaves were imported legally into the United States while only approximately 100 kilograms of narcotic drugs were seized or purchased in the illicit market by federal agents . . . . It would not be factual to say of the narcotic statutes and regulations what the Supreme Court said of other more general tax provisions - that they are 'directed at the public at large' . . . It would be equally inaccurate, however, to say, that they are 'directed at a highly selective group inherently suspect of criminal activities." (United States v. Minor, No. 31953 (2d Cir. July 3, 1968) (slip opinion, at pp. 2960, 2961).

The report by the United States Treasury Department, Bureau of Narcotics, for the year ended December 31, 1966, cited

above and in the Minor case, supra, notes that 88 persons were registered under the marihuana tax act of 1937 to handle marihuana. (at p. 10). Of the 88 registrations under the marihuana tax act as of December 1966, 5 were importers, manufacturers and compounders, 9 were dealers, 59 were practitioners, and 15 were involved in research, instruction and analysis. (Table 3 at p. 44). These are persons who are legally authorized to possess marihuana in the United States. And those persons who may possess marihuana legally under federal law, may also do so under state law. The registration requirement in 26 U.S.C. §4753 is expressly conditioned upon the applicability of the occupational tax requirements of §4751. An analysis of §4751 shows on its face that the occupational tax provisions, are directed only towards those who may lawfully engage in marihuana transactions under state law. In enumerating the classes of professionals subject to occupational tax and registration requirements, §4751 follows the enumeration of classes of individuals who, under §3-7 of the Uniform Narcotic Drug Act, 9B ULA 409 et seq. - in force in all American jurisdictions - might lawfully manufacture wholesale, dispense, prescribe or possess marihuana. Thus, neither 21 U.S.C. §174 and §176a is directed toward a class inherently suspect of criminal activities.

The only disclosure of any kind in this case relates to the time of importation and the character of the marihuana and heroin. Neither 21 U.S.C. §174 nor §176a, in connection with this indictment, accuse Howard of any crime for failing to declare the

marihuana and heroin at importation. His crime is receiving, etc. a particular class of marihuana or heroin, that is, that which " . . . theretofore had been imported and brought into the United States contrary to law."

Any merchandise being brought into the country must be declared at the time of importing, or as soon thereafter as is practicable, to the customs officer. 19 U.S.C. §1459, 1461, 1463. The heroin would not have been permitted through. 21 U.S.C. §173. The marihuana would not have been permitted through unless it was being imported by a registered importer, 21 U.S.C. §4751, 4753. However, at that point, neither would have the character necessary to a conviction under 21 U.S.C. §174, 176a. United States v. Reyes, supra; Arrizon v. United States, supra. If the heroin and marihuana were seized under 49 U.S.C. §781, 787(d), the matter would be ended. Only after the heroin and marihuana is imported contrary to law, does it fall within the class which permits conviction under 21 U.S.C. §174 and 176a. Howard, if he was the importer, cannot complain of his own failure to see that the customs law was satisfied at a time when he would not have been convicted, and, if he was not the importer, he was required to declare nothing.

The pith of Howard's contention seems to be that Marchetti, Grosso and Haynes permit him to participate in the importation of narcotics and marihuana, and the violation of customs law, without criminal penalty. That position should be rejected.

VI

THE BUICK WAS LAWFULLY SEIZED AND SEARCHED.

The Buick was searched, and the heroin discovered, incident to a lawful seizure. Howard's argument that "there is no such thing as a search incident to a lawful seizure" and that this search, because warrantless, was beyond the Fourth Amendment, is incorrect and misconceives the issue. (Appellant's brief, p. 8, line 18, p. 11, line 12). No warrant was required to seize and search the Buick because the agents had probable cause to believe the Buick was used to facilitate the receipt, concealment and transportation of illegally imported marihuana.

The information available to the customs agents gives ample basis to support the seizure. Howard arrived in the Buick at a prearranged location to pick up a car containing marihuana. Before picking up the car, Howard, in the Buick made at least two passes, which the agents could believe were for the purpose of seeing whether the pickup could be safely made. The large sum of cash, and Howard's peculiar story, furnished additional reasons for believing Howard was not the innocent thief he claimed to be. The agents could also infer, that, if the marihuana were unloaded, the load car would be returned, and Howard would have used the Buick to depart from the area. After Howard's arrest, the load car was again properly searched incident to the arrest. Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966),

cert. den. 385 U.S. 977. The marihuana which the agents had earlier seen in the load car was still there.

49 U.S.C. §781 provides in part:

> "(a) It shall be unlawful . . . (3) to use any vessel, vehicle or aircraft to facilitate the transportation . . . concealment, receipt, possession . . . of any contraband article.
>
> "(b) As used in this section, the term contraband article means -
>
> "(1) any narcotic drug . . . which has been acquired or is possessed . . . in violation of any of the laws of the United States dealing therewith . . . or which does not bear appropriate tax paid internal revenue stamps as required by law or regulations." 49 U.S.C. §787(d) defines narcotic drug as including - marihuana . . .

The marihuana in the load car was in evidence and did not bear the appropriate tax paid internal revenue stamps. Further, the agents had personal knowledge that it was illegally imported into the United States and therefore acquired and possessed in violation of 21 U.S.C. §176a. Juvera v. United States, 378 F.2d 433 (9th Cir. 1967). 49 U.S.C. §782 authorizes the seizure of any vehicle which has been or is being used in violation of any provision of §781.

The Buick was used to facilitate the transportation, concealment, receipt and possession of contraband marihuana, and

the agents certainly had probable cause to so believe. Burge v. United States, 342 F. 2d 408, 410 (9th Cir. 1965); United States of America v. One 1957 Lincoln Premiere, 265 F. 2d 734 (7th Cir. 1959), cert. den. 361 U.S. 828 (use of car to drive to sale of contraband is to facilitate); Pon Wing Quong v. United States, 111 F. 2d 751, 756 (9th Cir. 1940) (pasting a sticker on a trunk in order to make passage through customs easier is facilitating the transportation of opium). Appellant's reliance upon Platt v. United States, 163 F. 2d 165 (10th Cir. 1947) is mistaken. In Platt the court held that the evidence did not justify finding that the auto was used to facilitate the purchase of the contraband there involved because it was not used in the actual purchase, but merely as a means of getting to the drugstore.

Once the Buick was lawfully seized, it was proper to search it. Lockett v. United States, 390 F. 2d 172 (9th Cir. 1968); Burge v. United States, 342 F. 2d 408, 410 (9th Cir. 1965).

The Fourth Amendment does not require a warrant. It forbids unreasonable searches and seizures. The seizure and search of the Buick Howard used to pick up the load car and the marihuana was clearly not unreasonable.

VII

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE CONVICTION OF HOWARD ON BOTH COUNTS.

The evidence sustains, indeed compels, the conclusion that the trial court was correct in convicting Howard of both offenses. The presence of both the marihuana and the heroin in vehicles driven by Howard virtually eliminates any real possibility that Howard is the victim of accident, appearance and circumstance.

First, Howard's argument that as to him the marihuana is not illegally imported has now been rejected twice by this circuit and once by the Fifth Circuit. The proposition, that because customs agents, in the course of their law enforcement duties, uncover information that marihuana is to be illegally imported into the United States and then permit the illegal plan to continue under surveillance, the marihuana loses its illegally imported character, is neither good logic nor good policy. In Juvera v. United States, 378 F. 2d 433, 437 (9th Cir. 1967), the court described Howard's contention as " . . . too frivolous to be worthy of comment." The Juvera holding was reaffirmed in Pedersen v. United States, No. 21,729 decided March 26, 1968 (9th Cir.).

Any other rule would hamper customs law enforcement, and encourage the illegal movement of marihuana and heroin across our international borders. The risk of prosecution would be limited to mere drivers of the vehicle loaded with contraband who are usually only paid employees. The shippers in Mexico and the purchasers in the United States, those primarily culpable, would be protected

from prosecution by the very law enforcement techniques designed to catch them in the act.

As Howard concedes, the other circuits which have considered this issue, also hold that the marihuana remains illegally imported even though brought in with the knowledge of or under the supervision of federal customs agents. Haynes v. United States, 319 F. 2d 620 (5th Cir. 1963); United States v. Davis, 272 F. 2d 149 (7th Cir. 1959).

Second, the evidence in the case clearly sustains a finding that Howard had possession of the marihuana and the heroin. The marihuana was concealed in the load car; the heroin was concealed in the Buick. Howard drove both cars. The only question then is whether Howard knew the marihuana and heroin were there.

The load car was parked at a location designated by someone associated with the shipper in Tijuana after the marihuana arrived in Los Angeles. Within a short time after the load car was parked as directed, on a dark Los Angeles side street, Howard arrived. He scouted the area before leaving his car. He walked directly to the load car, got in and drove away. He stopped at a gas station to make a telephone call, and then resumed driving. When arrested, fourteen or fifteen blocks away from where he took the load car, he told a story about stealing the car in order to steal the wheels and sell them for $8 each. He had a large sum of cash on him at the time. Both Howard's conduct and his story justify a conclusion he knew the marihuana was in the load car. This evidence is like that in Lannom v. United States, 381 F. 2d 858

(9th Cir. 1967), where this Court said: "Lastly it is claimed that the evidence is insufficient to support the verdict. The same charge was made in Rodriguez-Gonzales v. United States, supra, (378 F. 2d 256 [9th Cir. 1967]) and it was held that the assertion was patently without merit." (at p. 862) Aguilar v. United States, 363 F. 2d 379 (9th Cir. 1966).

The evidence is equally sufficient to sustain a finding that Howard knew the heroin was in the Buick. Howard locked the Buick when he parked it and customs agents, using a key taken from Howard, had to unlock the Buick when they returned about fifteen minutes later. It is reasonable to infer that in the quarter of an hour that the Buick was parked, the opportunity for anyone else to place heroin in the Buick was limited to someone who also had a key and knew where the Buick was located. Of course, that such a possibility automatically negatives the more probable conclusion that the heroin was in the car while Howard was driving it, is unsupported in reason or authority.

Contrary to Howard's argument, ownership of the Buick is not an element which must be present to establish possession of the heroin. Of course, it would be relevant. Equally relevant is the actual custody and control of the Buick while the heroin was in the car. Ownership of the car driven by Howard is certainly a fact equally available to Howard, if the fact would provide any exculpatory evidence.

A final fact which the court could have used in determining that Howard knew the heroin was in the Buick was Howard's

arrival to pick up the marihuana. Howard's involvement with one kind of contraband is certainly evidence that a second kind of contraband associated with him, is present by design, rather than accident.

Eason v. United States, 281 F. 2d 818, 820, 821 (9th Cir. 1960) is a similar case. In Eason, the evidence showed that the defendants had gone to Tijuana and parked a convertible automobile with the top down on the streets of Tijuana for about three and one-half hours. On their return, a customs search revealed a paper bag containing marihuana and amphetamine and seconal tablets. In that case the defendants both took the stand in order to deny putting the bag there or knowing of its presence. This Court said:

> "There is no question but that the package could have been put in its hiding place by someone without the appellants' knowledge. They contend under these circumstances that the mere fact that the goods were found in the car they were driving is not sufficient circumstantial evidence of knowledge; that an inference of innocence was as reasonable as an inference of guilt; that, since anyone could have put the package there, the jury was not entitled to infer from its presence in their car that appellants had put it there.
>
> "Possession can be established by circumstantial evidence . . . (citing authorities).
>
> " . . . We cannot say in this case that

the theory that the narcotics were secreted by a stranger is so patently reasonable as to warrant our ruling as a matter of law that an inference of knowledge was not available from the facts of the case. We conclude that it was proper to leave this determination to the jury and that its judgment will not be disturbed." (at pages 820, 821).

Finally, there is sufficient evidence from which the trier of fact could have found that the heroin was illegally imported into the United States. As this Court has observed, it is common knowledge that heroin may not be brought into the United States nor manufactured here. Verdugo v. United States, supra, at p. 6; 21 U.S.C. §173. And Howard possessed marihuana from Mexico, implying that he had the knowledge and ability to arrange for the illegal importation of heroin.

Howard's arguments may have been appropriate for argument on the evidence at the trial level. They are not sufficient to reverse this judgment.

CONCLUSION

For the reasons indicated, the judgment should be sustained.

Respectfully submitted,

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